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IN THE

Supreme Court of the United States

October Term, [redacted] 1963

No. 211

MARVIN DELANE WHITE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1962

No. .....

MARVIN DELANE WHITE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Appellee.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Marvin Delane White, the petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on March 11, 1963.

Opinions Below.

The opinion of the Circuit Court of Appeals for the Ninth Circuit, (*infra* Appendix A) is reported at 215 F. 2d 113.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on March 11, 1963 (*infra* Appendix B). Rehearing was denied on April 18, 1963 (*infra* Appendix

C). The jurisdiction of this Court is invoked under 28 United States Code §1254(1). An order extending time to file Petition for Writ of Certiorari to and including June 17, 1963, was granted by this Honorable Court on May 9, 1963.

Questions Presented.

1. Was the evidence sufficient to establish that appellant had any possession of narcotics under either Count 1 or Count 2 of the indictment?

2. Was the evidence sufficient to establish that appellant at any time received, concealed or transported narcotics?

3. May an accused be convicted of a crime solely upon the uncorroborated testimony of an accomplice?

4. Did the trial Court err in instructing the jury that "a defendant is not required to prove a fact beyond a reasonable doubt, nor by a preponderance of the evidence. It is enough if the evidence he produces is sufficient to create in the minds of the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense."?

5. Did the trial Court err in instructing the jury that section 174 of Title XXI, of the United States Code, further provides that "whenever on trial for violation of this statute, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."?

6. Does that portion of Title XXI, United States Code, section 174, violate the rule of presumption of innocence of a defendant, the rule of reasonable doubt,

and violate the Fifth Amendment to the United States Constitution, in that the said provision of section 174 deprives appellant of the process of law, and compels a defendant in effect to be a witness against himself, and is the statute therefore unconstitutional?

7. Is the presumption created by section 174 of Title XXI United States Code, unconstitutional in that there is no rational connection between the fact proved and the ultimate fact presumed, and in that the inference created thereby is an arbitrary one?

8. Did the prosecutor commit prejudicial and reversible error in his argument to the jury?

Statute Involved.

Title XXI United States Code, section 174, provides in pertinent part:

> "whoever fraudulently or knowingly receives, conceals, buys, sells, or in any manner facilitates the transportation concealment or sale of any narcotic drug after being imported or brought into the United States, knowing the same to have been imported or brought into the United States contrary to law, shall be guilty of an offense."

Title XXI United States Code, section 174, further provides:

> "whenever on trial for violation of this statute, the defendant is shown to have or have had possession of the narcotic drug. Such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

Statement of the Case.

Petitioner, Marvin Delane White, was charged in Count 1 of an indictment returned in the United States District Court, Southern District of California, Central Division, with having sold or facilitated the sale of heroin to one Keith Wallace, and in Count 2 with having knowingly and unlawfully received, concealed and facilitated the concealment and transportation of heroin, both in violation of Title XXI United States Code, section 174.

Petitioner proceeded to trial before a jury.

A motion for a judgment of acquital was denied; petitioner was found guilty on both counts, a motion for new trial was denied and petitioner was on May 28, 1962, sentenced to serve five years imprisonment on each count, to run consecutively. The judgment of the District Court was filed on May 28, 1962.

Petitioner thereupon filed a timely notice of appeal on May 28, 1962. The Court fixed bail pending determination of petitioner's appeal.

The trial court had jurisdiction based on title XVIII United States Code, section 3231.

United States Court of Appeals for the Ninth Circuit had jurisdiction based on Title XXVIII United States Code sections 1291 and 1294.

This Court has jurisdiction of the Appeal based on Title XXVIII, United States Code section 1254(1).

The Circuit Court affirmed the judgment. See Judgment attached in Appendix B.

The judgment also appears in the record filed herein.

Statement of Facts Pertinent to Appeal.

Herman J. Meuron, a treasury department chemist who was stipulated to be an expert in chemistry, testified that he first saw Government Exhibits 1, 2 and 3, on October 10, 1960; that he examined them and that Government Exhibit 3 contained heroin [R. T. 9-10].[1]

Keith Wallace testified that he saw appellant on June 21, 1959, while standing in line in front of a movie theatre with his girl friend and asked appellant if he could meet him the next day. The witness and appellant were to meet at Tiny Naylor's Drive-In on Western Avenue the next day [R. T. 12]; that on June 22, 1959, he had a meeting with agents of the Federal Narcotics Bureau in his apartment; that he was given $100.00 by the agents who wanted him to try and purchase some heroin from appellant [R. T. 13]; that the agents searched his person, told him to go ahead and meet appellant, that he met appellant at the drive-in at around lunch time, the appellant having driven up several minutes before he arrived, that he got into appellant's car, drove off a couple of blocks, asked if he could purchase some heroin, using the word "score", that appellant said yes, and that he gave appellant the $100.00 and was told to go to a gas station [R. T. 14].

That there was no discussion as to the quantity of heroin, and that he had not specifically bought heroin from appellant before for the same amount of money; that he was driven back to the drive-in, appellant left and he got in his car and went to the gas station, went into the men's room; that he went to the gas

[1] "R. T." refers to the Reporter's Transcript of the proceedings at the trial.

station across the street and found no narcotics; that he went back to his apartment, told the agents what had happened, suggested he ought to go and try to find it, to which they agreed; that the agents searched him again [R. T. 15].

That he went looking for appellant and saw appellant parking his car near a bowling alley near La Cienega Boulevard. That there was another person in the car with appellant; that he double-parked and said he couldn't find any narcotics [R. T. 16] that someone in appellant's car gave him new directions; that he went to another gas station and found the heroin which he took back to his apartment and gave to one of the Federal Agents, and that he was searched [R. T. 17]; that Exhibit 3 appears to be what he found at the filling station on June 22, 1959 [R. T. 19].

On *cross-examination*, Keith Wallace testified that he was presently residing at the California Institution for men at Chino, California [R. T. 19]; that he originally went to prison in 1956 for conviction of forgery, was released in September, 1958, on parole, and was presently serving time for parole violation; that at the time he met appellant at the movie, the witness was with his girl friend and appellant was with four or five people [R. T. 20]; that the meeting with appellant on June 21, was a chance meeting; that he told appellant he wanted to meet him the next day, but did not tell appellant the purpose of the meeting [R. T. 21]; that upon arriving at the drive-in the next day, he entered and sat at the counter; that appellant arrived about 15 minutes later; that prior to arriving at the drive-in, he had departed from his apartment, that the drive took approximately 20 min-

utes; that at the apartment, he had a conversation with the Federal Agents with respect to cooperation that he was offering in return for their support [R. T. 22]; that about three or four days prior to his meeting with appellant on June 21, he had been arrested by Federal Narcotic Agents and arraigned before the United States Commissioner on charges of sale of heroin; that he was addicted to and under the influence of heroin on June 17, 1959 [R. T. 23]; that he was addicted to heroin on June 21, 1959, and on the evening thereof; that he was fixing four or five times a day; that his source of narcotics was a source other than appellant, that he had a private supply kept by him to which he could resort when he needed a fix; that the source of this supply was not the appellant [R. T. 24]; that prior to June 21, 1959, he had last seen appellant about six months prior in January of 1959; that he knew appellant better than slightly but not too well; that there was no mention of narcotics in his conversation with appellant on the evening of June 21, 1959, and that his supply of narcotics was in the City of Los Angeles [R. T. 25].

That when the witness was searched by the Federal Agents on June 22, 1959, prior to meeting appellant, all of his clothes were not taken off and that he did not believe that his shoes were taken off [R. T. 26]; that the Federal Agents searched his automobile for a couple of minutes and consisted of looking in the glove compartment and underneath the seats; that it was his understanding that the Federal Agents were to follow him, that he then drove to the drive-in and did not observe the Agents following him [R. T. 27]; that after meeting appellant at the drive-in, they got

into appellant's car and drove off; leaving his car at the drive-in; that the witness was under the influence of narcotics at that time; that he did not remember in which direction they went, and that they were gone from the drive-in approximately 15 or 20 minutes [R. T. 28]; that he and appellant drove continually for the period of time that they were together in appellant's car; that he did not request appellant to let him out; that he asked appellant if he knew where he could get some heroin; that at that time, he had with him the money which was given to him by the Federal Agents; that he thought the sum was $100.00 [R. T. 29]; that he did not recall the denomination of the bills and that to his knowledge, the money was marked; that he gave the money to appellant and was directed to go to a gas station somewhere on Melrose and look in the men's room [R. T. 30]; that appellant dropped him off at the drive-in and he got in his own automobile and went to the gas station; that he thought it was a Standard gas station; that he went into the men's room and looked up under the sink where the heroin was supposed to be; that there was nothing there; that he went to another gas station across the street [R. T. 31]; that he looked in the men's room and could not find any heroin and then drove directly to his apartment without meeting any Federal Agents along the way; that the drive took approximately 15 minutes [R. T. 32]; that he waited for the Federal Agents for about 5 minutes until they arrived; that there were four or five agents; that they asked him for heroin and he told them that he did not have any; that they asked for the money back and he told them that he did not have that either [R. T. 33]; that the agents were a little angry and wanted to know what

happened: that he told them what happened and suggested that he ought to go and try and find appellant; that he did go looking for appellant and the agents were supposed to follow him, and that he contacted appellant on the street near the bowling alley [R. T. 34];

That as far as he knew, a grand jury indictment was not returned against him on the charge of selling narcotics; that he was never brought to trial for sale of narcotics or for possession by Federal Authorities; that he was taken before the Commissioner and arraigned on such charges [R. T. 36-37]; that his understanding with the Federal Agents was that he was to cooperate with them and they would cooperate with him; that he was not wearing any recording equipment during his ride with appellant; that the agents did not ask him if he wanted to or would wear such recording equipment; that he happened to turn up a street and noticed appellant parking his car near the bowling alley by chance [R. T. 37] that he had a conversation with both occupants of appellant's vehicle for a couple of minutes; that a Mr. Burley was driving the vehicle in which appellant was sitting; that he did not alight from his own vehicle; that the conversation took place as the vehicles were parked side by side; that he was yelling out the window at Mr. Burley and appellant and they were yelling at him; that this took place in the middle of the afternoon [R. T. 38]; that he said he had gone to the gas station and there wasn't anything there; that he was asked if he went to the right gas station; that he told him what gas station he had gone to, that he was told to go to another gas station on the same street; that he did not know whether it was appellant who told him to go to the gas station [R. T.

39]; that when he went from the drive-in to the gas station he was alone; that when he left the first station and went to the second gas station he was also alone; that when he went from there to his apartment he was also alone; that he was not stopped en route from the gas station to his apartment; that one-half hour or 45 minutes elapsed from the time he met appellant at the drive-in until the time that he went back to his apartment to meet the Federal Agents; that he was released on parole from the California State Prison in September of 1958 and saw appellant in January of 1959 on one occasion and did not see him again until June 21, 1959, at which time he met appellant at the movie [R. T. 40]; that when he returned to the apartment, he was not asked to take off all of his clothing and was not asked to take off his shoes and that he did not remember whether the agents searched his automobile; that he was under the influence of heroin at the time that he arrived back at his apartment [R. T. 41].

On redirect examination, Wallace testified that he did not use any word referring directly to narcotics on June 21, 1959, at the theatre [R. T. 43]; that on the following day, he asked appellant if he could score; that he went to the penitentiary after June of 1959, for parole violation; that his time had not yet been set [R. T. 44]; that he had spoken to appellant a couple of times between January and June of 1959 on the telephone [R. T. 45]; that he did not know appellant would go to the bowling alley on La Cienega prior to June of 1959.

On recross-examination, Keith Wallace testified that the state prison sentence he was currently serving was

for a parole violation; that one of his parole charges was with reference to the charge of sale of narcotics for which he had been arrested by the Federal Agents; that his parole was violated for not working, the use of narcotics, association with people of ill repute, and suspicion of the sale of heroin [R. T. 47].

John Daly, a United States Treasury Agent, and witness for prosecution testified that he and several other officers met with Keith Wallace by prior arrangement at Keith Wallace's apartment, on June 22, 1959; at which time Wallace advised the agents of a pending arrangement that he had made on the previous evening with appellant; that they discussed what had transpired between appellant and Wallace [R. T. 51]; that he searched Wallace's person, found no narcotics, took the money in his possession, and supplied Wallace with $100.00 of marked government funds and instructed him to keep his appointment with appellant; that another agent named Stark, searched Wallace's automobile; that they all proceeded to Tiny Naylor's Restaurant at Western and Beverly, keeping Wallace under surveillance during the drive; that he saw Wallace park his automobile at the drive-in, alight from the vehicle and enter the building; that he observed appellant's automobile; that appellant and Wallace left the drive-in [R. T. 52]; that a short while later, he observed Wallace and appellant return to the drive-in; that Wallace alighted from the vehicle, that appellant proceeded north on Western Avenue; that the witness and another officer followed Wallace to 7th and Normandie Streets; that he searched Wallace and did not find any narcotics or money on his person; that Wallace told him that defendant had stated that the narcotics

were behind the wash basin in the men's room of a filling station at Melrose and Van Ness [R. T. 53]; that the agents instructed Wallace to go there, and they followed him; that Wallace went into one station and then crossed the street and went into another station; that they then followed him back to Wallace's apartment where Wallace advised them that he was not able to find the narcotics; that he searched Wallace and did not find any [R. T. 54]; that Wallace said that if he did not go looking for appellant, appellant might become suspicious and that appellant and Skip Burley could ordinarily be found at the La Cienega Bowl on La Cienega Boulevard; that the agents instructed Wallace to drive to that location and look for appellant and that they followed him; that they thereupon lost sight of Wallace and did not see him again until they were back at Wallace's apartment at which time Wallace gave the agents the exhibit containing the narcotic [R. T. 55]; that the exhibits received into evidence were then forwarded to the Chemist in San Francisco [R. T. 56].

On *cross-examination*, John Daly testified that he had first seen Keith Wallace shortly before 12 noon on June 22, 1959; that he was informed by Wallace via telephone that Wallace had had the conversation with appellant the previous evening that subsequent to Wallace's arrest Wallace agreed to cooperate with the Federal Agents [R. T. 57]; that at the time Wallace was arrested, he was advised that if he would cooperate with the agents, any attention or cooperation he would give would be called to the attention of the United States Attorney's office; that the agents could make no guarantees to him; that he searched Keith Wallace

at his apartment on June 22, 1959; that all of Wallace's clothing was not removed and that another agent searched Wallace's vehicle. The witness could not recall whether the search of the vehicle took place in his presence [R. T. 58-59]; that he and a Los Angeles County Deputy Sheriff followed Wallace to the drive-in, observed him alight from his vehicle and enter the drive-in, and observed appellant arrive [R. T. 59]; that appellant remained in his vehicle and thereafter Wallace entered appellant's vehicle; that he observed appellant drive East on Beverly Boulevard and make a left turn north bound at the first block east of Western [R. T. 59]; that he did not follow appellant's vehicle but observed appellant and Wallace return to the drive-in in less than 10 minutes, that Wallace alighted from the vehicle, appellant proceeded away from the drive-in and Wallace got into his own vehicle [R. T. 61]; that he followed Wallace south on Western Avenue and met him at Seventh and Normandie Streets; that he could not recall the route taken by Wallace but that Wallace was within his vision at all times [R. T. 62-63]; that Wallace informed the agents that he had paid the money to appellant that he had been instructed by appellant to go to a service station at Melrose and Van Ness where the narcotics would be behind a wash basin; that the service station on Melrose and Van Ness was north of the drive-in at Beverly Boulevard and that Wallace was travelling south to arrive at the corner of Seventh and Normandie [R. T. 64]; that Wallace was searched at Seventh and Normandie although his clothing and shoes were not removed; that Wallace's vehicle was searched by another agent, and that no narcotics or money were found in the automobile [R. T. 65]; that Wallace thereupon

went to the intersection of Melrose and Van Ness, was observed to go into a gas station; that the witness did not ask Wallace if he could accompany him; that Wallace came out of one gas station and went to another gas station [R. T. 66]; that he did not talk to Wallace after Wallace came out of the first gas station; that Wallace came out of the second gas station, re-entered his vehicle and drove to his apartment; that the witness did not overhear any of the conversation that transpired between Wallace and appellant [R. T. 67].

That he did not observe the transfer of any heroin or other narcotics between Wallace and appellant on June 22, 1959, and that the first time he saw the heroin was when it was brought to Wallace's apartment by Wallace and handed to the witness [R. T. 67]; that he had a conversation with Wallace when Wallace entered the apartment and that Wallace had no money or narcotics on him; that Wallace informed him that he had been unable to find any heroin at either one of the gas stations and that he (Wallace) had better go looking for appellant and that the agents should follow him to the La Cienega Bowl [R. T. 69]; that the agents followed Wallace to the vicinity of the bowling alley almost to Santa Monica Boulevard; that the witness did not see the meeting between Wallace and appellant near the Bowling Alley and did not see Wallace leave [R. T. 70]; that the witness and the Sheriff's Deputy looked in the area of the La Cienega Bowl to find either appellant or Wallace and were unable to do so and thereupon returned to Wallace's apartment; between 20 minutes and a half hour elapsed from the time that he last saw Wallace in the vicinity of the bowling alley until the time that Wallace returned to his apartment [R. T. 71].

On re-direct examination, John Daly testified that Wallace had told the agents that he had been instructed to go to Normandie and Van Ness and that they (the agents) met Wallace at Seventh and Normandie because the agents were under the impression that appellant was to deliver narcotics at Tiny Naylor's and wanted to meet Wallace at Seventh and Normandie so they could take possession of the heroin at that location [R. T. 72].

On re-cross examination, John Daly testified that the reason for meeting Wallace at Seventh and Normandie was that Wallace had stated that on prior occasions when narcotics were purchased from appellant, that appellant would give them to him directly and the agents wanted to meet Wallace away from the point of sale to avoid the suspicion and the agents would thereby be able to follow Wallace away from the drive-in, making sure that appellant was not following Wallace and thereupon take custody of the narcotics; that when appellant drove North on Western, Wallace was driving in the opposite direction [R. T. 74-75]; that the agents thought that the point of sale would be Beverly and Western; that the agents just assumed that there would be a hand-to-hand sale at that location; that there was no hand-to-hand sale at Beverly and Western [R. T. 75-76].

On further re-direct examination, John Daly testified that Wallace had told the agents that he was going to meet appellant at Tiny Naylor's and that that was the witness's reason for going there [R. T. 76].

R. S. Canty, a United States Treasury Agent, and witness for the prosecution, testified that he saw ap-

pellant on June 22, 1959; that he had been advised by agent Daly that a transaction would take place at Tiny Naylor's Drive-in at Beverly and Western and that he had driven there with another agent, Victor Maria; that he observed Wallace arrive at and enter the drive-in; that he observed appellant drive up and observed Wallace and appellant leave driving East on Beverly for one block and then turning north on Oxford Street [R. T. 78]; that the witness and agent Maria followed appellant and that half way up the block appellant turned around and headed south on Oxford, make a right turn on Beverly Boulevard and go north on Western; that he did not see either appellant or Wallace after that on that day [R. T. 79].

On cross-examination, R. S. Cantu testified that he did not at any time observe any transfer of heroin or other narcotics between appellant and Wallace; that he did not overhear any conversation with relation to narcotics by appellant; that he had been a narcotics agent for about 12 years and had had occasion to use recording equipment; and that to his knowledge, no recording equipment was used with reference to the alleged transaction [R. T. 80].

On re-direct examination, R. S. Canty testified that a fargo device is a recording device; that he had just one at the time of the alleged transaction; that there were 32 agents in the Los Angeles office at the time and one recording device [R. T. 81].

Darrell Victor Stark, a treasury agent and witness for the prosecution testified that he searched a Volvo automobile owned by Keith Wallace on June 22, 1959, at approximately noon time; that this was the first

day that he had seen Wallace [R. T. 82]; that he had made another search of the Volvo automobile at the corner of Seventh and Normandie Streets in Los Angeles approximately one hour later; that the search took approximately five minutes [R. T. 83].

On cross-examination, Darrell Victor Stark testified that he did not search the person of Keith Wallace either at Wallace's apartment or at Seventh and Normandie Streets but testified that he saw the person of Wallace searched by another agent at both locations on re-direct examination [R. T. 84].

The government moved to introduce Government Exhibits 1, 2 and 3, and counsel for appellant objected to the introduction of the evidence on the ground that there was no foundation laid and that the corpus delecti had not been proven. Appellant's motions were denied and the exhibits received in evidence [R. T. 89-91]. Counsel for appellant thereupon moved for a judgment of acquittal, which motion was denied [R. T. 92-95].

The appellant did not take the stand and no evidence was introduced on his behalf.

In final argument the prosecuting attorney stated in part:

> "Let us take a look at the chief witness for the government, Keith Wallace. Indeed, the surveillance of this narcotics case is imperfect. There is no direct agent buy in this case where an agent can testify, get on the stand and testify that he bought narcotics or he overheard a conversation. We are not dealing here with East Los Angeles, simple marijuana peddlers, these are West Los

Angeles people, clever. No agent gets in with these people, must use informants. That's part of the game. It's a necessity." [R. T. 112].

The prosecuting attorney further stated later in the argument with reference to the government witness Keith Wallace:

> "Remember something else: under our rules, his earlier statements are available. He was cross-examined and he could have been cross-examined on any earlier statements had he differed from them greatly. This must be the same story he has originally told." [R.T. 115].

The prosecuting attorney later stated, again referring to the government witness Keith Wallace:

> "I don't say that he is a noble citizen in our community. He certainly is not. Noble citizens aren't in the narcotics business, aren't able to make buys. Of course, the agents remembered the exact details better than Wallace. They are trained to do so." [R.T. 116].

On rebuttal, the prosecuting attorney said:

> "I would like some day to open a narcotics file on my desk and find out that the chief informant for the Government is the President of the Bank of America and he has gone out and made a buy. You don't get people like that; you don't use them as informers—the way these people do business, they have very little conversation to make a sale—in fact that's the way they do business, as little conversation as possible—remember, there is very little conversation needed when narcotics sales take

place, almost none—it is indeed not a perfect case. There is no Fargo Device and counsel makes a point, why didn't you have a transmitting device? They happen to have one device for 40 agents. They are often not used in these cases.—you see a dozen informants take the stand and they are not eager witnesses." [R. T. 126-130].

REASONS FOR GRANTING THIS WRIT.

I.

The Evidence Was Insufficient to Establish That Appellant Had Any Possession of Narcotics Under Either Count One or Count Two of the Indictment.

Assuming for the purpose of argument at this point, that that provision of Title XXI United States Code Section 174, which provides that knowledge of unlawful importation may be inferred from a failure of the defendant to satisfactorily explain his possession of narcotics, is constitutional (a point which we shall raise later in this argument), the rule does require a possession by the defendant of the narcotics.

We are compelled to allege that there is no testimony in this cause, either by Keith Wallace, the informer, or by any of the federal agents, which places any narcotics in the hands of appellant at or about the time of the alleged offense, and further that there is no evidence to indicate that there was any possession of narcotics on the part of appellant.

It was said in *Willaman v. United States* (C. C. A. 8), 286 Fed. 852, that a possession, to be incriminating, must be personal and exclusive.

Any evidence tending to indicate possession of narcotics on the part of appellant was of the most circumstantial nature, and in order to justify a conviction, the circumstances should be such as to exclude every reasonable hypothesis but that of guilt. *Chass v. United States* (C. C. A. N. J.), 258 Fed. 911, *cert. den.* 250 U. S. 665, 40 S. Ct. 12, 63 L. Ed. 1196; *Triangle Club Inc. v. United States* (C. A. Iowa 1959), 265 F. 2d 829. Inasmuch as Keith Wallace was admittedly an addict, was under the influence of narcotics at the time of the alleged offense, had his own private cache of narcotics, and also was quite willing to cooperate with the Federal Agents who had previously arrested him on a charge of sale of narcotics, would it not be as reasonable a hypothesis that Wallace himself, kept the money given him by the agents and delivered some of his own private supply of narcotics to the Federal Agents, in an effort to extricate himself from the quite serious charges that he was facing. Wallace himself had testified on cross-examination that after failing to find any narcotics at the gas station, he had again located appellant who was in a car with another party, and that someone in appellant's car had given him new directions [R. T. 16] and that he did not know whether it was appellant who told him to go to the gas station [R. T. 39].

We must, therefore, submit that there was no proof of possession of narcotics by appellant and that there can, therefore, be no inference or presumption under Section 174, that there was an unlawful transportation or that appellant had knowledge of this fact.

II.

The Evidence Was Insufficient to Establish a Violation of Count Two of the Indictment in That There Was No Proof of Any Kind That the Appellant Had at Any Time Received, Concealed or Transported Narcotics.

What has been said in paragraph I, of the Argument, *supra*, must also apply herein to the charge of receiving, concealing and transporting narcotics. Again there is no direct evidence of any such acts on the part of appellant. There is no evidence that he ever had the narcotics in his hands or possession. The same argument with respect to the alleged circumstantial evidence must apply equally as to Count two. It is just as logical to hypothesize against Keith Wallace and his motives as against appellant.

We thus have an illustration of the reason for the rule that to justify conviction on circumstantial evidence, the latter must be such as to exclude every reasonable hypothesis but that of guilt. (*Chas. v. United States, supra; Triangle-Club Inc. v. United States, supra; McTyre v. United States* (C. A. La. 1954), 213 F. 2d 65.)

(We must remember that Wallace also was, at the time of trial, presently serving a term in the California State Prison and was under the influence of narcotics and an addict at the time of the alleged offense.)

III.

This Court Should Establish That an Accused Cannot Be Convicted of a Crime Solely Upon the Uncorroborated Testimony of an Accomplice.

We are not unmindful of the case of *Audett v. United States* (265 F. 2d 837) decided by this Court; however, it is our opinion that the Bar would be dere-

lict in its duty in adopting an apathetic attitude toward a situation such as this and we feel compelled to continue to suggest that our appellate tribunals change their position toward the testimony of self-seeking accomplices.

It is our contention that in every case there should be some corroboration of the vital part of the case, which in this instance is the alleged transaction between appellant and the witness Keith Wallace. The testimony of the accomplice Wallace was not supported. There was no corroboration and we respectfully ask the Court to reverse the conviction upon this ground among others set forth herein. We believe that this Court should establish at this time that an accused cannot be convicted on the uncorroborated evidence of an alleged accomplice.

In discussing the sufficiency of the evidence and the relation of the accomplice to the production of the evidence, there is always the question of the association of the accomplice and the defendant. The evidence shows that the accomplice Wallace had met appellant on occasions.

In *Ong Way Jong v. United States*, 245 F. 2d 302 the Court clearly states that the mere association of the defendant in question with a co-defendant or third party during the time that such co-defendant or third party or parties are trafficking in narcotics, does not in any way establish the guilt of the defendant in question. The reason for such rule is set forth at page 306 of the above-cited case where the Court observes that it is conceivable that those parties that are actually dealing in narcotics, are using their association with the defendant as a blind to cover their "real connections".

To infer guilt from mere association, does not meet the test set forth in *Marino v. United States* (9th Cir.), 91 F. 2d 691, 694.

See also *Dong How v. Superior Court*, 81 Cal. App. 2d 153, at page 158, where the Court stated "mere association does not make a conspiracy. There must be evidence of some participation or interest in the commission of the offense."

These cases are cited merely to illustrate the proposition that the accomplice associates with the defendant, and when the defendant is brought to trial, it is this association, the fact that they met, the fact that they talked to each other, which brings us to the proposition of whether a man should be convicted upon the uncorroborated testimony of an accomplice. We contend that he should not, and we must urge that this Court give careful reconsideration to the rule concerning the sufficiency of the uncorroborated testimony of an accomplice to sustain a conviction.

Notwithstanding the conclusions of the learned Judge who wrote the opinion in *Audett v. United States*, *supra*, we respectfully submit that the federal doctrine which has permitted convictions upon the uncorroborated testimony of an accomplice, is not sound, and we believe that this Court has the inherent power to change a rule of evidence without legislative enactment, and we respectfully submit that the rule requiring corroboration of an accomplice has been adopted, after mature consideration in many of the states such as Alabama, Alaska, Arizona, Arkansas, California, Canal Zone, Georgia, Idaho, Iowa, Kentucky, Minnesota, Montana, Nevada, New Hampshire, New York, North Dakota,

Oklahoma, Oregon, Pennsylvania, Puerto Rico, South Dakota, Texas, Utah, The Virgin Islands and Wyoming.[2]

California for the first time in 1872 enacted Section 1111 of the *Penal Code* which provides as follows:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence, as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the case in which the testimony of the accomplice is given."[3]

We must point out in connection with this contention, that the trial court failed to instruct with reference to the subject that the testimony of an accomplice should be considered with caution. We contend that under the circumstances in this case, the failure to so instruct was error. The case hinged virtually

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[2]See digest of cases in *Weiler v. United States* (1954), 347 U. S. 62, which also sets forth the extreme rule in which such evidence may be used.

[3]California has augmented this provision with Section 2061, sub-section 4 of the Code of Civil Procedure which provides:

> "4. That the testimony of an accomplice ought to be viewed with distrust and the evidence of the oral omissions of a party with caution."

and these sections have been construed by the courts holding that the requirement of corroboration of an accomplice is in addition to the doctrine of reasonable doubt and requires acquittal if the accomplice testimony is not corroborated, even if the jury is convinced of guilt to a moral certainty.

People v. McKee, 31 Cal. 2d 185, 187 P. 2d 741.

entirely upon the testimony of the accomplice Keith Wallace and it should also be noted that it has been pointed out that where there is conflicting evidence as to whether or not the witness is an accomplice, the trial court must instruct the jury upon the subject of accomplices regardless of whether or not such an instruction has been requested by the defendant. 19 A. L. R. 2d 1387, 1391.

Unless so clear as to become a question of law, the question of whether the witness should be regarded as an accomplice is one for the jury. 19 A. L. R. 2d 1391, 1393.

We feel further compelled to point out that in the case of *Sykes v. United States*, 204 Fed. 909, it was held that there is no *absolute rule* of the Federal Courts that the testimony of an accomplice need not be corroborated, for the Court stated:

> "It is only when the evidence is sufficient to convince of the guilt of the accused beyond a reasonable doubt, that one may lawfully be convicted of a crime. It is undoubtedly the better practice, says the Supreme Court, for courts to caution juries against too much reliance upon the testimony of accomplices and to require corroborating testimony before giving credence to them. *Holmgren v. United States*, 217 U. S. 519, 523, 524; 30 Supreme Ct. 588, 592, 54 L. Ed. 861. And the conclusion is that the uncorroborated testimony of the confessed perpetrator of a crime, contradicted under oath by himself, contradicted by other witnesses, and inspired by hope of immunity from punishment, which in this case has since turned to glad fruition, that another was an instigator or

> a participator in the perpetration of her crime, is not only insufficient to establish guilt beyond a reasonable doubt, but that it presents no substantial evidence of it."
>
> *Jahnke v. State*, 68 Neb. 154, 104 N. W. 154, 158.

The value with which courts view accomplice testimony is spelled out in form 12, the instruction relating to accomplices, which is found in 20 Federal Rules Decisions, being the suggested form for use in criminal cases and also form 11 of Suggested Forms, 20 Federal Rules Decisions, which provides as follows:

> "All evidence of a witness whose self interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should be considered with caution and weighed with great care."

We most respectfully urge this Court to review the wisdom of the rule as set forth in *Audett v. United States, supra*. Such review would not be unusual inasmuch as time and time again, the courts have reconsidered the merits of earlier decisions.

After many years, the Supreme Court of the United States has altered its position in very important phases of the interpretation of the Constitution and evidence to be used in both Federal and State Courts. We have specific reference to:

Mapp v. Ohio, 367 U. S. 643;

Elkins v. United States, 364 U. S. 216;

This view was set forth in the dissenting opinion in *Green v. United States*, 356 U. S. 165, at page 195, where it is stated:

"Ordinarily it is sound policy to adhere to prior decisions but this practice has quite properly never been a blind, inflexible rule. Courts are not omniscient. Like every other human agency, they too can profit from trial and error, from experience and reflection. As others have demonstrated, the principle commonly referred to as stare decisis has never been thought to extend so far as to prevent the courts from correcting their own errors. Accordingly, this Court has time and time again from the very beginning reconsidered the merits of its earlier decisions even though they claimed great longevity and repeated reaffirmation. See *Erie v. Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, *Graves v. New York*, 306 U. S. 466, 83 L. Ed. 927, *Nye v. United States*, 313 U. S. 33, 85 L. Ed. 1172, where it was said:

> 'I am quite willing that it be regarded hereafter as the law of this Court, that its opinion upon the construction of the Constitution is always open to discussion, when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported.'

(Quoting Chief Justice Taney, in the Passenger Cases, 7 How. 283, 12 L. Ed. 781.) Indeed, the Court has a special responsibility where questions of constitutional law are involved to review its decisions from time to time and where compelling reasons present themselves to refuse to follow erroneous precedents."

IV.

The Court Erred in Instructing the Jury "That a Defendant Is Not Required to Prove a Fact Beyond a Reasonable Doubt nor by a Preponderance of the Evidence. It Is Enough if the Evidence He Produces Is Sufficient to Create in the Minds of the Jurors a Reasonable Doubt With Respect to Any of the Facts Essential to Constitute the Offense."

The rule has been oft stated that the scope of an instruction in a particular case, whether civil or criminal, is to be determined not alone by the pleadings therein, but also by the evidence in support of the issues; and even though an issue is raised by the pleadings, it is not proper to give an instruction thereon where there is no basis for it in the evidence.

Bird v. United States, 187 U. S. 118, 47 L. Ed. 100, 23 S. Ct. 42;

Coffin v. United States, 162 U. S. 664, 40 L. Ed. 1109, 16 S. Ct. 943.

At the trial of this cause, appellant did not testify and no evidence was introduced on his behalf. It is therefore submitted that the above instruction given by the trial court [R. T. 142] was erroneous and constituted prejudicial error in that it tended to induce in the minds of the jurors, the fact that a reasonable doubt would be created with respect to the facts essential to constitute the offense if evidence were produced on the part of appellant.

It has been stated that an instruction not based on the evidence is erroneous in that it introduces before the jury, facts not presented thereby and is well calculated to induce them to suppose that such state of

facts, in the opinion of the Court, is possible under the evidence and may be considered by them.

53 *Am. Jur.* 455-456.

It is respectfully submitted that the Court should not give an instruction stating an hypothesis or representing a theory having no basis in the evidence (53 *Am. Jur.* 457).

The trial court may not, either on his own motion, or at the request of either party, give an instruction which as applied to the facts is misleading, or well calculated to mislead.

Washington and G. R. Company v. Gladmon, 98 U. S. 479;

Hall v. Ware, 92 U. S. 728.

It has been said that instructions are misleading when they tend to lead the jury to a wrong conclusion on the facts, when they place the burden of proof on the wrong party or give the jury an erroneous impression as to the degree of proof required—or when they apply the existence of facts of which there is no evidence or which have not been proved.

53 *Am. Jur.* 441;

Bollen v. United States, 326 U. S. 607.

While this instruction given by the trial court is a true and correct statement of the law and would be entirely proper and probably necessary in the event that some evidence were produced by appellant, we must urge that the giving of the instruction was prejudicial error under the circumstances inasmuch as appellant did not testify or produce any evidence and that the instruction was therefore misleading. The Court, prior

to giving this instruction, did instruct the jury that the defendant in a criminal case is not required to take the stand and testify, that no presumption of guilt may be raised therefrom and that no adverse inference may be drawn from the failure to testify, and further that the presumption of innocence still applies [R. T. 141]. We submit that this was sufficiently and correctly stated, but that the impact of the instruction given by the Court relative to the presumption of innocence and the failure of the appellant to testify, was entirely diminished and virtually emasculated by the instruction later given by the Court that:

> "A defendant is not required to prove a fact beyond a reasonable doubt, nor by a preponderance of the evidence. It is enough if the evidence he produces is sufficient to create in the minds if the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense." [R. T. 142].

We urge that this particular instruction, implies, in the mind of a reasonable man, that while a defendant is not required to prove a fact beyond a reasonable doubt or by a preponderance of the evidence, he must produce some evidence sufficient to create in the minds of the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense and that this instruction, literally interpreted, would lead a juror of average intelligence to this conclusion. The instruction was clearly unnecessary in light of appellant's choosing to rely on the state of the prosecution's evidence and in view of the previous instructions given by the Court, and the allegedly er-

roneous instruction should only have been given if some evidence were produced by the defendant so that such evidence might be weighed accordingly.

Instructions as a whole must be consistent and harmonious, not conflicting and contradictory.

Descrant v. Cerillos Coal R. Co., 178 U. S. 409, 44 L. Ed. 1127, 20 S. Ct. 967.

Instructions which give to the jury for their guidance contradictory and conflicting rules which are unexplained, and where following one would or might lead to a different result, than would obtain by following the other, the instructions are inherently defective.

Drossos v. United States (C. C. A., 8th), 2 F. 2d 538.

Such is true even though one of the instructions correctly states the law applicable to the facts of the case, since the correct instruction cannot cure the error in the contradictory erroneous instruction, and it would be impossible to tell which the jury followed.

Armour and Co. v. Russell (C. C. A. 8th), 144 Fed. 614.

Such inconsistent instructions are calculated to mislead and confuse the jury, since the jury are thereby left in doubt and without any certain guide as to the law arising upon the evidence.

117 *A. L. R.* 770.

It is submitted that the instruction as given was conflicting with other instructions and is grounds for a new trial or reversal inasmuch as the jury could

not decide which instruction should prevail, it is impossible for the Court to tell which instruction the jury followed and which they ignored and it must be considered on appeal that the jury assumed that all of the instructions were correct; and that they felt at liberty to follow either the correct or incorrect instruction.

Drossos v. United States (C. C. A. 8th), 2 F. 2d 538.

V.

The Court Erred in Instructing the Jury That: Section 174 of Title XXI of the United States Code Further Provides That Whenever on Trial for Violation of This Statute, the Defendant Is Shown to Have or to Have Had Possession of the Narcotic Drug, Such Possession Shall Be Deemed Sufficient Evidence to Authorize Conviction Unless the Defendant Explains the Possession to the Satisfaction of the Jury.

The Court so instructed the jury as just above outlined, at page 143 of the Reporter's Transcript. We respectfully submit that this instruction is erroneous in that it is conflicting and inconsistent with instructions given by the Court as to the presumption of innocence, burden of proof and doctrine of reasonable doubt, and further that the presumption of Section 174 of Title XXI United States Code is unconstitutional, deprives a defendant of due process of law and compels a defendant in effect to be a witness against himself and further that there is no rational basis in fact for the presumption created thereby as we will point out hereinafter.

VI.

That the Portion of Title XXI, United States Code, Section 174, Creating the Presumption Is Unconstitutional in That It Violates the Rule of Presumption of Innocence of a Defendant, the Rule of Reasonable Doubt, Violates the Fifth Amendment to the United States Constitution in That the Said Provision of Section 174 Deprives Appellant of Due Process of Law and Compels Defendant in Effect, to Be a Witness Against Himself.

A. It is well established that a person accused of crime is presumed to be innocent until he is proved guilty.

United States v. Fleischman, 339 U. S. 349;
Michaelson v. United States, 266 U. S. 42;
Schaffer v. United States, 251 U. S. 466;
Kirby v. United States, 174 U. S. 47;
Yeem v. United States, 268 U. S. 178.

The Government has the burden of establishing all of the essential elements of the crime with which the accused is charged and must prove his guilt beyond a reasonable doubt.

Agnew v. United States, 165 U. S. 36;
Davis v. United States, 160 U. S. 469;
Ledbetter v. United States, 170 U. S. 606.

This presumption has relation to every fact that must be established against a defendant to prove his guilt beyond a reasonable doubt.

Kirby v. United States, 174 U. S. 47.

And the burden of establishing the guilt of a defendant rests on the prosecution from the beginning to the end of a trial.

Lillenthal v. United States, 97 U. S. 237.

And non-action of the defendant in a criminal case cannot be substituted for action on the part of the state as to any matter required to be established as a part of the prosecution's case.

20 *Am. Jur.* 154.

We therefore contend that the giving of the instruction reciting Section 174 of Title XXI of the United States Code and the presumption contained therein, was error. We contend that all presumptions are in favor of the defendant, that he is presumed to be innocent and that his guilt as to all elements of the offense must be established beyond a reasonable doubt by the prosecution.

That portion of Section 174, therefore, violates the rules of presumption of innocence and reasonable doubt, and we further submit that these presumptions which have so long endured as a well-established principle of the common law, may not be corroded away by legislative enactment under the guise of establishing a statutory rule of evidence.

B. The presumption contained in Section 174 and the giving of an instruction based thereon, deprived appellant of due process of law. The Constitution is, of course, controlling and may limit any legislative enactment repugnant thereto. As was stated in *United States v. Butler*, 297 U. S. 62:

> "The Constitution is the supreme law of the land ordained and established by the people. All legislation must conform to the principles it lays down."

It has well been said that presumptions of law are especially dangerous in the administration of criminal justice when used to control or impair the natural

fundamental presumption of innocence inasmuch as their effect is to give to evidence a technical probative force beyond that which it would naturally and ordinarily possess in producing conviction in the minds of the jury.

12 *Am. Jur.* 321.

Thus a legislature may not validly command that the finding of an indictment or mere proof of the identity of the accused shall create a presumption of the existence of all of the facts essential to guilt.

Tot v. United States, 319 U. S. 463.

It is therefore respectfully submitted that the presumption contained in Section 174 of Title XXI United States Code and the giving of the instruction based thereon, deprived appellant of due process of law in that the Congress was precluded by the Constitution from enacting such legislation.

C. The presumption of Section 174 compels a defendant in effect, to be a witness against himself and an instruction based thereon, is therefore erroneous in that the statute as worded provides that:

> "Whenever on trial for violation of this statute, the defendant is shown to have or have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

It is respectfully submitted that as worded, the section compels a defendant to testify. The statute provides that the defendant in effect, must explain the possession to the satisfaction of the jury. Had the

legislature chosen to provide that possession shall be deemed sufficient evidence to authorize conviction unless otherwise explained, or contrary evidence introduced, no valid argument could be made on behalf of a defendant to the creation of such a presumption, assuming that it had a rational basis in fact, a point which we shall allude to hereafter. However, where the statute in question states in part "unless the defendant explains his possession to the satisfaction of the jury", we feel compelled to urge that an average reasonable and prudent juror would define this to mean literally what it purports to say in effect, that the defendant must explain his possession.

While persons trained in the law might well interpret the wording of the statute to mean that some explanatory evidence must be introduced on the part of a defendant, we cannot escape the fact that the wording as constituted, compels the defendant himself to explain the possession, and that a jury would so construe the language used.

In this connection, it is to be remembered that words will be given their ordinary meaning.

S.S. Kresge Co. v. Sears (C. C. A. 1st), 87 F. 2d 135, *cert. den.* 300 U. S. 670.

and that penal statutes are to be interpreted strictly against the state and liberally in favor of the accused.

United States v. Resnick, 299 U. S. 207, 81 L. Ed. 127.

and that words of a statute are to be given the meaning commonly attributed to them.

United States v. Cooper Corp., 312 U. S. 600, 85 L. Ed. 1071.

and that words are to be given their natural, popular and recognized meaning.

United States v. Cooper Corp., 312 U. S. 600;

United States v. Resnick, 299 U. S. 207;

United States v. Kirby Lumber Co., 284 U. S. 1, 76 L. Ed. 131;

United States v. Stewart, 311 U. S. 60.

The *Fifth Amendment to the United States Constitution*, provides:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentation or indictment of a grand jury, except in cases arising in the land or naval forces or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy for life or limbs; NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use without just compensation." (Italics ours)

We must therefore urge that the applicable statute, as worded, shifts the burden of proof upon the accused and forces the accused to become a witness against himself.

VII.

That Section 174 of Title XXI, United States Code Is Further Unconstitutional in That There Is No Rational Connection Between the Fact Proved and the Ultimate Fact Presumed, and That the Inference Is Arbitrary.

A presumption cannot ordinarily be raised from some fact proved unless a rational connection exists between such fact and the ultimate fact presumed:

Morrison v. California, 291 U. S. 83, 78 L. Ed. 664, 54 S. Ct. 281.

And the legislature cannot constitutionally make one fact conclusive evidence of another material fact in controversy, unless such fact is and of itself, by virtue of its own force, conclusive:

Handy v. Delaware Trust Company, 285 U. S. 352.

It is essential to the validity of legislation which makes one fact presumptive or *prima facie* evidence of another, that there exists some rational connection between the facts proved and the ultimate facts presumed; statutes creating presumption from certain facts will not be sustained if the presumptions created have no relation in experience to those facts.

McFarland v. American Sugar Ref. Co., 241 U. S. 79;

Statutes which declare one fact conclusive evidence of another material fact in controversy are unconstitutional if the former is not, in and of itself, by virtue of its own force, conclusive, and such statutes violate the due process clause of the Constitution.

Handy v. Delaware Trust Company, 285 U. S. 352;

Heiner v. Donnan, 285 U. S. 312.

The rules herein enunciated were discussed by Mr. Justice Roberts in *Tot v. United States*, 319 U. S. 463, where, speaking for the majority of the Court, an analysis was made of a statutory presumption that the possession of a fire arm by a person previously convicted of a crime of violence or by a fugitive from justice was *prima facie* evidence that it was shipped or transported or received in interstate commerce. The opinion stated:

> "Under our decisions a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience. It is not permissible to shift the burden by arbitrarily making one fact which has no relevance to the guilt of the offense, the occasion of casting on the defendant the obligation of exculpation."

We submit that the presumption of the statute is inconsistent with any argument drawn from experience and that it cannot logically be inferred that the narcotics prohibited by the statute have been imported and brought into the United States contrary to law, and that a defendant knows that the same were imported or brought into the United States contrary to law upon a showing of possession. To so infer, would be to take the rather naive attitude that all narcotics are of a foreign origin and not of a home grown variety.

Can we in reality permit ourselves to indulge in the naive speculation that no heroin or other narcotics are produced within the confines of the United States? The presumption of Section 174 excludes this possibil-

ity. Common experience has shown that all types of sin and vice are not limited by local or national boundaries, and we must therefore assume that persons within the territorial limits of the United States are therefore not incapable of producing narcotics of a home grown variety. This contention is substantiated by numerous authorities.[1]

Since heroin is a derivative of plant life, we submit that there is no rational basis to believe that the plants from which heroin is ultimately derived cannot be grown within our own borders and that the presumption of Section 174 must therefore fall as it has no rational connection whatever between the fact proved and the ultimate fact presumed.

VIII.

Counsel for the Government Was Guilty of Misconduct Which Was Prejudicial to Appellant and Wrongfully Influenced the Jury.

Whether intentionally or unintentionally, counsel for the Government committed acts of misconduct which were prejudicial to the appellant. Improper argument,

[1] In support of this contention appellant respectfully refers the Court to the excellently documented book entitled "The Traffic in Narcotics," authored by Harry J. Anslinger, recently United States Commissioner of Narcotics, and William F. Thompkins, United States Attorney for the District of New Jersey, published in 1953 by Funk and Wagnells Co., Library of Congress Catalog Card No. 53-6984, wherein it is stated at page 18, that:

> "Studies clearly show that the major illicit sources of the world's narcotics supply today are Communist China, Burma, Malaya, India, Japan, Turkey, Thailand, Iran, Syria, Italy and Mexico (page 10); cocaine is obtained from the leaves of a plant indigenous to Peru and Bolivia, and the chewing of the coca leaf is habitual in Peru and Bolivia and also prevalent in Columbia and Northern Argentina and Brazil (page 10); marijuana is today found growing either wild or under cultivation in wide areas of India, the Shan States of Burma, Turkey, Syria, Lebanon, Greece, Brazil, Mexico,

remarks, or conduct of counsel are presumptively prejudicial and impose on the prosecution the burden of showing that no prejudice resulted. (24 *C. J. S.*, p. 851, sec. 1888; *United States v. Michael* (C. A. Pa.), 180 F. 2d 255, *cert. den.* 339 U. S. 3978). It has been said on occasions too numerous to mention or to require citation, that it is as much the duty of prosecuting attorneys to see that a person on trial is not deprived of any of his statutory or constitutional rights as it is to prosecute him for any crime with which he may be charged, and further that while the prosecutor should and is expected to strike hard blows, he is not permitted to strike foul ones.

It is the duty of the prosecuting attorney, who represents all the people and has no responsibility except fairly to discharge his duty, to hold himself under proper restraint and avoid violent partisanship, partiality and misconduct which may tend to deprive the defendant of the fair trial to which he is entitled.

Berger v. United States, 295 U. S. 78.

THE UNITED STATES and in Africa, and in Western European countries only small quantities are grown." (Emphasis ours).

It is stated at page 21 of this work, that marijuana is grown illegally in some states of the United States.

It is further stated at page 20 that:

"due to the ease with which it grows, marijuana presents a continuing problem. Numerous police departments have educated their personnel to recognize the plant and have initiated local campaigns to irradicate it from vacant lots and roadsides in localities where it has been found growing.

"The United Nations Economic and Social Council, Commission of Narcotic Drugs, is composed of fifteen members of the United Nations which are important producing or manufacturing countries or countries in which illicit traffic in narcotic drugs constitutes a serious social problem and is composed of Canada, China, Egypt, France, India, Iran, Mexico, Netherlands, Peru, Poland, Turkey, U.S.S.R., United Kingdom, United States and Yugoslavia. (Page 61)

In the argument advanced by counsel for the Government at page 112, of the Reporter's Transcript, said counsel proceeded beyond the scope of argument and engaged in actual testimony, where he stated:

> "We are not dealing here with East Los Angeles, simple marijuana peddlers, these are West Los Angeles people, clever. No agent gets in with these people, must use informers. That's part of the game. It's a necessity."

It is submitted that it is common knowledge that the East Los Angeles area is basically an area inhabited predominantly by persons in the Lower Income Brackets and composed for the most part of persons belonging to various minority ethnic groups. There was certainly no evidence in the record on the trial of this matter, the appellant was a "West Los Angeles person," and therefore more clever than an "East Los Angeles person." The remarks were uncalled for and implied that appellant was something worse than a mere East Los Angeles simple marijuana peddler. Counsel for the prosecution further implied by his comment that inasmuch as appellant was a "West Los Angeles people," he was clever, and that therefore no federal agent could make the contact or alleged purchase of narcotics by himself and had to use an informant.

It is submitted that counsel in argument to the jury should avoid saying anything designed as, or having the effect of an appeal to the social class, or sectional prejudices of the jury, and that this practice has been condemned on occasions too numerous to mention. See cases set forth in 53 *Am. Jur.* 402, 403.

It is further respectfully submitted that counsel for the Government committed prejudicial error in his final argument; when he, referring to the witness Keith Wallace, stated:

> "Remember something else, under our rules, his earlier statements are available. He was cross-examined and he could have been cross-examined on any earlier statements had he differed from them greatly. This must be the same story he has originally told."

The record shows that the appellant had been previously tried for the same offense, convicted, and the judgment reversed. This was the second trial for this offense. It has been held that reference by counsel, in argument to the jury on a later trial of a cause, to previous trials and hearings in the same cause, is not only improper, but is regarded as a very serious offense, which, unless the circumstances show that the misconduct was harmless, may furnish ground for reversal of the judgment.

53 Am. Jur. 294.

Counsel for the Government again engaged in unfair comment when he stated:

> "Of course, the agents remember the exact details better than Wallace. They are trained to do so." [R. T. 110].

While counsel in final argument is surely permitted the right to comment on the evidence and indeed has a duty to do so, the rule has been stated that counsel should never in the course of argument state facts which are based on his own personal knowledge only, regardless of their relevancy to the issues at bar, but

if he desires to get such facts before the jury, he should take the stand and present them in a legitimate manner.

Hall v. United States (C. C. A. 4th), 250 Fed. 748.

Nor is it proper for counsel as a part of his argument, to relate personal experience to the jury.

Conn v. Seaboard Airline R. Co., 201 N. C. 157, 159 S. E. 331, 777 A. L. R. 641.

It is therefore contended by appellant that counsel for the Government committed misconduct when he stated:

> "I would like some day to open a narcotic file on my desk and find out that the chief informant for the Government is the President of the Bank of America and he has gone out and made a buy. You don't get people like that; you don't use them as informers—the way these people do business, they have very little conversation to make a sale—, in fact, that's the way they do business, as little conversation as possible—remember, there is very little conversation needed when narcotic sales take place, almost none—it is indeed not a perfect case. There is no Fargo Device and counsel makes a point, why didn't you have a transmitting device? They happen to have one device for 40 agents. They are often not used in these cases.—you see a dozen informants take the stand and they are not eager witnesses." [R. T. 126-130].

It is submitted that there was no evidence whatsoever introduced at the trial of the action relative to the matters commented upon by counsel for the prosecu-

tion. The comments of the prosecutor stating that very little conversation is required to make a sale, find no basis in the evidence; that statement that a dozen informants take the stand and they are not eager witnesses, finds no basis in the evidence, and these and the other comments of counsel, it is submitted, were not based on any evidence introduced at the trial and not based upon common knowledge and counsel was thereby precluded from stating facts based upon his own personal knowledge only.

IX.

That Defendant Was Denied a Fair Trial and Deprived of Due Process of Law.

Defendant was denied a fair trial and deprived of due process of law by reason of the errors occurring at the trial and as set forth hereinabove.

Conclusion.

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted,

RUSSELL E. PARSONS,

APPENDIX A.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Marvin Delane White, Appellant, vs. United States of America, Appellee. No. 18,134, March 11, 1963.

Appeal from the United States District Court for the Southern District of California, Central Division.

Before: Barnes and Jertberg, Circuit Judges; Pence, District Judge.

PER CURIAM:

Appellant was indicted in Count I for the sale of heroin on June 22, 1959; in Count II for the possession or concealment of heroin on June 22, 1959; and in Count III for possession and concealment of marijuana on June 21, 1960. Upon pleas of not guilty to each count, the trial judge severed Count III. A jury found appellant guilty of Counts I and II, and appellant was sentenced to two concurrent five year terms. Count III was dismissed.

Appellant urges as grounds for appeal:

I. Insufficiency of the evidence of possession as to both counts.

II. The federal rule that an accused can be convicted by the uncorroborated testimony of an accomplice should be changed.

III. Error in instructions with respect to:
   a) the burden of proof on defendant
   b) presumptions created by unexplained possession of drugs

IV. The presumption in 21 U.S.C. § 174 is unconstitutional:

a) because it violates the due process clause

b) because no rational basis therefor

V. Prejudicial error of prosecutor in argument to the jury.

We adopt the government's statement as to the facts of the case,[1] as we must. *Glasser v. United States*, 1942, 315 U. S. 60.

I.

Possession need not be actual possession, if there is circumstantial evidence sufficient to establish dominion and control. *Rodella v. United States*, 9 Cir. 1960, 286 F. 2d 306; *Cellino v. United States*, 9 Cir. 1960, 276 F. 2d 941. There was sufficient, substantial evidence to go to the jury, and to convict, if the jury believed the testimony of Keith Wallace.

II.

Counsel asks us to change the federal rule on the lack of necessity of corroboration of the testimony of an accomplice. This we have refused, and do refuse, to do. *Audett v. United States*, 9 Cir. 1959, 265 F. 2d 837, notes 45 and 46, and cases cited; *Williams v.*

[1]On June 21, 1959 Wallace saw White at a theatre in Beverly Hills. Wallace asked White to meet him on the following day. They agreed to meet at Tiny Naylor's Drive-in on June 22, 1959. Wallace met with Federal agents on the morning of June 22, 1959. Wallace was searched. His car was searched. Wallace was supplied with $100 in Government funds. Wallace, followed by a Federal agent, drove to Tiny Naylor's Drive-in. Wallace parked his car and went inside the Drive-in. As soon as White arrived Wallace left the Drive-in and got into White's automobile. They drove around for a few minutes. White was given the $100 in official funds. White agreed to furnish Wallace with heroin. White directed Wallace to a specific Standard gas station. White told Wallace that the heroin would

United States, 9 Cir. 1962, 308 F. 2d 664; *Toles v. United States*, 9 Cir. 1962, 308 F. 2d 590; *Bible v. United States*, 9 Cir. 1963, ... F. 2d .... (No. 17209, decided February 25, 1963).

III.

The first instruction objected to was favorable to appellant. But whether it was or not, no objection was made to it when it was given, and any objection was waived. *Walker v. United States*, 9 Cir. 1962, 298 F. 2d 217; *O'Neal v. United States*, 9 Cir. 1962, 310 F. 2d 175. No point is made that the instruction is an incorrect statement of law, merely that it is not applicable to the facts of this case. Under such circumstance, it is peculiarly defense counsel's obligation to make timely objection. Defendant's interpretation of the facts would eliminate and fail to consider much testimony favorable to the prosecution.

The second instruction complained about would be error only if the presumption contained in 21 U. S. C. §174 is unconstitutional.

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be under the sink in the men's room. White dropped Wallace at Tiny Naylor's Drive-in. Wallace got into his car and drove to 7th and Normandie where he met with Federal agents. Wallace was searched. His car was searched. Wallace drove to the Standard gas station and looked in the men's room for the heroin. Wallace did not find the heroin in the Standard gas station. Wallace looked in another gas station across the street. Again Wallace did not find the heroin. Wallace returned to his apartment. Wallace was searched by Federal agents. Wallace then left his apartment and drove to a bowling alley near Santa Monica and La Cienaga. Wallace parked his car parallel to White's car. White and a man named Burley were in White's car. Wallace told White and Burley that he could not find the heroin at the Standard gas station. Wallace was then directed to another gas station. Wallace went to the gas station and picked up the heroin. Wallace then drove back to his apartment and surrendered the heroin to a Federal agent."

IV.

Section 174 of Title 21, United States Code, with its presumption, is not unconstitutional. *Caudillo v. United States*, 9 Cir. 1958, 253 F. 2d 513, certiorari denied, 357 U. S. 931.

V.

Under this point, appellant cites good law, *Berger v. United States*, 1935, 295 U. S. 78, wholly inapplicable to the factual situation disclosed by the record.[2] There was clearly no prejudicial misconduct, just the good, ordinary and usual arguments presented to juries by prosecutors.

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[2] "The four instances of alleged prejudicial misconduct are as follows:

(a) "We are not dealing here with East Los Angeles, simple marihuana peddlers, these are West Los Angeles people, clever. No agent gets in with these people, must use informers. That's part of the game. It's a necessity." (R. T. 112, 133.)

(b) "Remember something else, under our rules, his earlier statements are available. He was cross-examined and he could have been cross-examined on any earlier statements had he differed from them greatly. This must be the same story he has originally told." (R. T. 115.)

(c) "Of course, the agents remember the exact details better than Wallace. They are trained to do so." (R. T. 116.)

(d) "I would like some day to open a narcotic file on my desk and find out that the chief informant for the Government is the President of the Bank of America and he has gone out and made a buy. You don't get people like that; you don't use them as informers . . . the way these people do business, they have very little conversation to make a sale . . . in fact, that's the way they do business, as little conversation as possible . . . remember there is very little conversation needed when narcotic sales take place, almost none . . . It is indeed not a perfect case. There is no Fargo Device and counsel makes a point, why didn't you have a transmitting device? They happen to have one device for 40 agents. They are often not used in these cases . . . you see a dozen informants take the stand and they are not eager witnesses." (R. T. 125-129.)

But even had there been a taint of unfairness or prejudice, no voice was raised in protest—no objection ever raised—no chance given the trial court to cure any alleged error. This is a complete waiver.

Finding no error, and the record disclosing appellant had a fair trial, the judgments of conviction on Counts I and II are *Affirmed.*

(Endorsed) Per Curiam Opinion Filed March 11, 1963.

Frank H. Schmid, Clerk.

APPENDIX B.

Judgment.

United States Court of Appeals, for the Ninth Circuit.

Marvin Delane White, Appellant, vs. United States of America, Appellee. No. 18134.

Appeal from the United States District Court for the Southern District of California, Central Division.

This Cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division and was duly submitted.

On Consideration Whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered March 11, 1963.

APPENDIX C.

Order Denying Petition for Rehearing.

United States Court of Appeals for the Ninth Circuit.

Excerpt from Proceedings of Thursday, April 18, 1963.

Before: Barnes, Jertberg, Circuit Judges, and Pence, District Judge.

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of appellant filed April 8, 1963, and within time allowed therefor by rule of court, for a rehearing of above cause be, and hereby is denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 211

MARVIN DELANE WHITE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 315 F. 2d 113.

JURISDICTION

The judgment of the court of appeals (Pet. App. 6) was entered on March 11, 1963. A petition for rehearing was denied on April 18, 1963. By order of Mr. Justice Douglas, the time for filing a petition for certiorari was extended to and including June

17, 1963. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the inference that petitioner was in possession of narcotics and that he received, concealed or transported narcotics.

2. Whether this Court should reconsider its decisions (a) upholding the constitutionality of the statutory presumptions arising from possession of narcotics and (b) holding it unnecessary to corroborate the testimony of an accomplice.

3. Whether there was plain error in the instructions of the court.

4. Whether argument of counsel, to which there was no objection, constituted plain error.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted of selling and facilitating the sale of five grams, 200 miligrams, of heroin, known to have been unlawfully imported, and of receiving, concealing and facilitating the concealment and transportation of such heroin (21 U.S.C. 174). Consecutive sentences of imprisonment for five years were imposed on each count (II R. 2, 86). The court of appeals affirmed, *per curiam*.

1. The evidence may be summarized as follows: Keith Wallace, a special employee of the Bureau of Narcotics, testified to making arrangements with petitioner for the purchase of heroin at a Los Angeles drive-in on June 22, 1959. Before keeping his appointment, federal agents searched Wallace and his car and gave him one hundred dollars for the purchase (I R. 12-14). Wallace met petitioner as planned at the drive-in and the two drove off together. Petitioner took the one hundred dollars and instructed Wallace that he would find the narcotics concealed under a wash basin at a described filling station (I R. 14, 31). Wallace attempted to follow his directions, but failed to find the narcotics at the station he believed to be the one described or at another station across the street. He then returned to his apartment and told the agents what had happened (I R. 15, 33-34). After a further search of his person and car, Wallace went to West Hollywood where he found petitioner and received additional directions as to how to reach the filling station in question. Following these directions, he found, under the wash stand, a package which he turned over to the agents (I R. 16-19). The substance, when analyzed by a government chemist, proved to be heroin (I R. 10, 56). There was no testimony on behalf of petitioner.

2. Petitioner attacks as prejudicial the following excerpts from the closing argument of the assistant United States attorney, none of which were objected to at the time:

> Let us take a look at the chief witness for the government, Keith Wallace. Indeed, the sur-

veillance of this narcotics case is imperfect. There is no direct agent buy in this case where an agent can testify, get on the stand and testify that he bought narcotics or he overheard a conversation. We are not dealing here with East Los Angeles, simple marijuana peddlers, these are West Los Angeles people, clever. No agent gets in with these people, must use informants. That's part of the game. It's a necessity [I R. 112].

Remember something else; under our rules, his earlier statements are available. He was cross-examined and he could have been cross-examined on any earlier statements had he differed from them greatly. This must be the same story he has originally told [I R. 115].

I don't say that he (Wallace) is a noble citizen in our community. He certainly is not. Noble citizens aren't in the narcotics business, aren't able to make buys. Of course, the agents remembered the exact details better than Wallace. They are trained to do so [I R. 116].

I would like some day to open a narcotics file on my desk and find out that the chief informant for the Government is the President of the Bank of America and he has gone out and made a buy. You don't get people like that; you don't use them as informants [I R. 125-126].

The way these people do business, they have very little conversation to make a sale. * * * In fact that's the way they do business, as little conversation as possible. * * * Remember, there is very little conversation needed when narcotics sales take place, almost none [I R. 126-127].

> It is indeed not a perfect case. There is no Fargo Device and counsel makes a point, why didn't you have a transmitting device. They happened to have one device for 40 agents. They are often not used in these cases, as you can suppose [I R. 129].
>
> You see a dozen informants take the stand and they are not eager witnesses [I R. 129].

The court, after instructing extensively as to the government's burden to prove guilt beyond a reasonable doubt and that no inference was to be drawn from petitioner's failure to take the stand (I R. 139-141), further told the jury (I R. 142):

> A defendant is not required to prove a fact beyond a reasonable doubt, nor by a preponderance of the evidence. It is enough if the evidence he produces is sufficient to create in the minds of the jurors a reasonable doubt with respect to any of the facts essential to constitute the offense.

Petitioner's counsel had earlier told the court (I R. 100), "Undoubtedly the general instructions that you give would be satisfactory." At the conclusion of the charge, he stated that there were no objections (I R. 147).

ARGUMENT

1. The evidence, which showed that petitioner negotiated the sale of narcotics, accepted the money and gave the government informer correct and explicit directions as to where to find the secreted narcotics, showed such dominion and control by petition-

er as to give rise to the statutory presumption arising from possession. *United States* v. *Wright*, 309 F. 2d 735, 738 (C.A. 7); *Cellino* v. *United States*, 276 F. 2d 941, 946 (C.A. 9); *Sykes* v. *United States*, 312 F. 2d 232 (C.A. 8), certiorari denied, May 27, 1963, No. 1086 Misc., O.T. 1962.

2. There is no occasion for the Court to reconsider its holding that the testimony of an accomplice need not be corroborated (*Caminetti* v. *United States*, 242 U.S. 470) in view of the record here which shows that Wallace was not an accomplice and that his testimony was, in any event, amply corroborated. Nor is there occasion for review of the holding of the Court that the statutory presumption arising from possession of narcotics is constitutional. *Yee Hem* v. *United States*, 268 U.S. 178 (see government brief in opposition, *Jennings* v. *United States*, No. 840 Misc., O.T. 1962, certiorari denied, June 17, 1963). The instruction of the trial court as to this presumption, to which there was no objection, was in the language of 21 U.S.C. 174.

3. Also given without objection was an instruction that petitioner need not prove a fact beyond a reasonable doubt or by a preponderance of the evidence, but that it was sufficient if he created a reasonable doubt in the minds of the jurors. It did not imply any duty on his part to testify and a specific instruction as to the absence of such a duty was given. The instruction was beneficial to petitioner.

4. The criticism of various portions of the Assistant United States Attorney's closing argument, to which no objection was made in the district court,

is unsound. Certainly, there was no "plain error" under Rule 52, F.R. Crim. P. The reference to the locality in which petitioner conducted his operations was incidental to the explanation of the need to use an informer. Nor was there any indirect testimony by the attorney as to his personal experience. The explanation as to the non-use of a recording or transmitting device to corroborate the testimony of the special employee was proper in view of defense counsel's criticism of the government's failure to produce such evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

HERBERT J. MILLER, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys.

JULY 1963.

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